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ALEXANDER L. STEVAS,
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No. 82-411

In the Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a company discriminates against male employees in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing an employee health insurance plan that offers less coverage for pregnancies of spouses than for their other medical expenses.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Baltimore & O. C. T. R.R. v. *United States*, 583 F.2d 678, cert. denied, 440 U.S. 968 12

Chastang v. *Flynn & Emrich Co.*, 541 F.2d 1040 6

EEOC v. *ARA Manufacturing Co.*, No. CA3-81-0406-F (N.D. Tex. filed Aug. 18, 1982), appeal docketed, No. 82-1549 (5th Cir. Oct. 19, 1982) 5

EEOC v. *Associated Dry Goods Corp.*, 449 U.S. 590 12

EEOC v. *Atlanta Gas Light Co.*, No. C81-1090A (N.D. Ga. filed Aug. 17, 1982), appeal docketed, No. 82-8646 (11th Cir. Oct. 8, 1982) 5

EEOC v. *Colby College*, 589 F.2d 1139 6

EEOC v. *Fruehauf Corp.*, No. 82-71299 (E.D. Mich. filed Apr. 9, 1982) 5

EEOC v. *Lockheed Missiles & Space Co.*, 680 F.2d 1243 ..... 5, 6

Page

Cases—Continued:

EEOC v. *St. Regis Paper Co.*, No. 8-82-1351 (S.D. Tex. filed May 14, 1982) 5

Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 12

Faraca v. *Clements*, 506 F.2d 956, cert. denied, 422 U.S. 1006 6

FEA v. *Algonquin SNG, Inc.*, 426 U.S. 548 11

Fitzpatrick v. *Bitzer*, 519 F.2d 559, rev'd, 427 U.S. 445 6

General Electric Co. v. *Gilbert*, 429 U.S. 125 ..... 1-2, 3, 5, 8, 14

Kansas Association of Commerce and Industry v. *EEOC*, No. 79-4145 (D. Kan. filed Aug. 2, 1979) 5

Los Angeles Department of Water and Power v. *Manhart*, 435 U.S. 702 6

McDonald v. *Sante Fe Trail Transportation Co.*, 427 U.S. 273 ..... 6, 8, 10

Miller v. *Youakim*, 440 U.S. 125 12

North Haven Board of Education v. *Bell*, No. 80-986 (May 17, 1982) 11

Power Reactor Co. v. *International Union of Electrical Workers*, 367 U.S. 396 12

Rosen v. *Public Service Electric & Gas Co.*, 477 F.2d 90 6

Page

Cases—Continued:

Udall v. *Tallman*, 380 U.S. 1 12

Wambheim v. *J.C. Penney, Co.*, 642 F.2d 362 6

Zuber v. *Allen*, 396 U.S. 168 12

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e (& Supp. IV) *et seq.* :

Section 701(k), 42 U.S.C. (Supp. IV) 2000e(k) 2, 10
Section 703(a), 42 U.S.C. 2000(a) 9
Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1) 7
Section 706, 42 U.S.C. 2000e-5 3

42 U.S.C. 1981 8

Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076 1

Miscellaneous:

123 Cong. Rec. (1977):

p. 22188 13

p. 29642 11

pp. 29650-29652 12

p. 29663 11

Page

Miscellaneous—Continued:

Discrimination on the Basis of Pregnancy 1977: Proposed Amendment to Title VII of the Civil Rights Act of 1964: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 11, 12

44 Fed. Reg. 23804 (1979), codified at 29 C.F.R. 1604 & App. 2

H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978) 10, 11

Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Proposed Amendment to Title VII of the Civil Rights Act of 1964: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) 11, 12

S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977) 8, 10, 11, 13, 14

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OPINIONS BELOW

The judgment of the en banc court of appeals (Pet. App. 22a-23a) is reported at 682 F.2d 113. The amended opinion and order of the district court (Pet. App. 9a-20a) is reported at 550 F. Supp. 66.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1982. The amended opinion and order of the district court was filed February 25, 1981. The petition for a writ of certiorari was filed on September 10, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076, in response to this Court's decision in *General Electric Co.* v.

Gilbert, 429 U.S. 125 (1976), which held that pregnancy-related classifications did not, on their face, constitute sex-based classifications under Title VII. The PDA amended the "Definitions" section of the Title (Section 701) to add subsection (k), which provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions * * *." (42 U.S.C. (Supp. IV) 2000e(k)).[1]

Within seven months after the PDA's passage, the Equal Employment Opportunity Commission revised its Guidelines on Discrimination Because of Sex to reflect changes required by the Act. The final Guidelines, and an Appendix of 37 Questions and Answers, were published on April 20, 1979. 44 Fed. Reg. 23804, codified at 29 C.F.R. 1604 & App. The Answers to Questions 21 and 22 set forth the Commission's position that Title VII, as amended by the PDA, requires that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions" (Pet. 5-6).[2]

2. In September 1979 John McNulty, an employee of petitioner, filed an EEOC charge alleging that the company had unlawfully discriminated against him by refusing to provide full insurance coverage for his wife's hospitalization due to pregnancy. One month later, a similar charge was filed on behalf of petitioner's male production and maintenance employees by the United Steelworkers of America, their collective bargaining representative.

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[1]The complete text of the new definition appears at Pet. 2-3.

[2]The guidelines also make clear that an employer is not obliged to provide the same level of health insurance coverage for pregnancy-related expenses of the spouses of male employees as it provides for its female employees. *Ibid.*

Petitioner's hospitalization and medical-surgical health insurance plan extends coverage to employees, their spouses, and unmarried children (Pet. App. 29a-30a). The plan pays in full for a semi-private hospital room for up to 120 days, and for all covered hospital services up to $750, and 80% of the excess up to 120 days (Pet. App. 31a-32a). A dependent's illness or injury is covered to the same extent as an employee's illness or injury, except that a dependent's pregnancy-related expenses are reimbursed only for up to $500 of the hospital charges (Pet. App. 37a).

3. Before the EEOC had acted on the McNulty and Steelworkers charges, petitioner filed suit on January 30, 1980 against the Commission and the charging parties, seeking a declaratory judgment that the statutory interpretation contained in the Commission's Answers to Questions 21 and 22 in the Guidelines was incorrect, and requesting that the court permanently enjoin EEOC from enforcing that interpretation (C.A. App. 6, 14). After the Commission completed processing of McNulty's charge, it filed an enforcement suit against petitioner on December 15, 1980, under Section 706 of Title VII, 42 U.S.C. 2000e-5.

Before discovery commenced in the Commission's Title VII enforcement suit, the district court, on cross motions for summary judgment, ruled in favor of petitioner in its declaratory judgment action (Pet. App. 9a-20a). Based on that ruling, the court dismissed the EEOC's complaint in the Title VII action for failure to state a claim upon which relief could be granted (Pet. App. 2la). Relying on *General Electric Co.* v. *Gilbert, supra,* the court held that petitioner's restriction on coverage for a spouse's pregnancy-related expenses "does not constitute gender-based discrimination" on its face and was not shown to have "caused any gender-based effect" in violation of Title VII (Pet. App. 16a-17a). The court recognized that the PDA was enacted in response to *Gilbert's* holding that pregnancy classifications are not,

on their face, sex-based classifications, but it concluded that the Act "carved out a narrow exception" to *Gilbert* that applied only to claims of pregnancy discrimination submitted by women employees or applicants for employment (Pet. App. 14a-16a).

4. A divided panel of the court of appeals, having consolidated the cases, reversed (Pet. App. 2a-8a). The panel rejected the view that the PDA's clarification of Title VII's definition of sex discrimination applied only to discrimination against female employees. Analyzing the PDA's language, the panel explained (Pet. App. 5a-6a):

> The first clause of the subsection provides that the terms "because of sex" and "on the basis of sex" include because of, or on the basis of, pregnancy, childbirth and related medical conditions. By statutory definition those disabilities are within the meaning of the word "sex." There is nothing in the first clause to suggest that the definition will vary depending upon the employment status of the pregnant woman. The second clause reads quite harmoniously with the first, since coverage of spouses is employment-related and the statutory reference to the receipt of fringe benefits contains no intimation that benefits payable with respect to the disability of a spouse are excluded from the statute's reach. The statutory reference to "ability or inability to work" denotes disability and does not suggest that the spouse must be an employee of the employer providing the coverage. In fact, the statute says "as other persons not so affected"; it does not say "as other *employees* not so affected."

Turning to the legislative history, the panel noted that Senators Bayh and Cranston stated that Title VII, as amended by the PDA, would require complete coverage for the wives of male employees, including pregnancy-related expenses, if complete coverage is provided for the husbands

of women workers (Pet. App. 6a). Recognizing that the Senate Committee apparently "thought the question an open one," the panel found that fact to provide "no platform for the company's contention that the question should be resolved upon a consideration of the reach of Title VII prior to enactment of the Pregnancy Discrimination Act" (Pet. App. 7a), i.e., under the principles of *General Electric Co.* v. *Gilbert, supra.* Rather, the panel stated, "[u]pon enactment, the new subsection became an integral part of Title VII" and it established, for the purpose of subsequent litigation, that all "[d]istinctions based on pregnancy * * * are distinctions based on sex" (Pet. App. 7a). The panel concluded (*ibid.*):

> Since the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute.

On rehearing en banc, a majority of the court upheld the panel's ruling for the reasons set forth in the panel's opinion (Pet. App. la).

ARGUMENT

1. Petitioner correctly asserts that the decision below conflicts with that of the Ninth Circuit in *EEOC* v. *Lockheed Missiles & Space Co.*, 680 F.2d 1243 (1982), that the issue is a significant and recurring one;[3] and that a uniform

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[3]See cases cited at Pet. 14, n. 13. See also *EEOC* v. *Atlanta Gas Light Co.*, No. C81-1090A (N.D. Ga. filed Aug. 17, 1982), appeal docketed, No. 82-8646 (11th Cir. Oct. 8, 1982); *EEOC* v. *St. Regis Paper Co.*, No. 8-82-1351 (S.D. Tex. filed May 14, 1982); *EEOC* v. *Fruehauf Corp.*, No. 82-71299 (E.D. Mich. filed Apr. 9, 1982); *Kansas Association of Commerce and Industry* v. *EEOC*, No. 79-4145 (D. Kan. filed Aug. 2, 1979); *EEOC* v. *ARA Manufacturing Co.*, No. CA3-81-0406-F (N.D. Tex. filed Aug. 18, 1982), appeal docketed, No. 82-1549 (5th Cir. Oct. 19, 1982).

national rule is important (Pet. 13-15). For those reasons, we agree that this Court should grant plenary review in this case.[4]

2. The Commission does, however, submit that the court of appeals was correct in holding that under Title VII, as amended by the PDA, an employer unlawfully discriminates against its male workers by providing a medical insurance plan that covers spouses' maternity costs less favorably than costs resulting from all other spousal illnesses or injuries. The PDA added one paragraph to Title VII's "Definitions" section, indicating that the statute's terms "because of sex" or "on the basis of sex" include distinctions relating to pregnancy. As the court of appeals recognized, the question here is whether that definition applies only to claims of pregnancy-based discrimination submitted by women workers, or whether it applies across-the-board to all Title VII claims involving pregnancy, submitted by men as well as women. The court of appeals properly adopted the latter construction.

a. It is well-settled that Title VII prohibits discrimination in fringe benefits[5] against male as well as female employees.[6]

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[4]The Solicitor General has also authorized the filing of a petition for certiorari in *Lockheed, supra,* which will suggest holding that case pending disposition of this one.

[5]Insurance coverage for spouses is a fringe benefit protected by the Act. *Los Angeles Department of Water and Power* v. *Manhart,* 435 U.S. 702, 709 n.14 (1978); *Wambheim* v. *J.C. Penney Co.,* 642 F.2d 362 (9th Cir. 1981).

[6]See, *e.g., EEOC* v. *Colby College,* 589 F.2d 1139 (1st Cir. 1978) (life insurance benefits); *Fitzpatrick* v. *Bitzer,* 519 F.2d 559 (2d Cir. 1975), rev'd for failure to award back pay, 427 U.S. 445 (1976) (retirement benefits); *Chastang* v. *Flynn & Emrich Co.,* 541 F.2d 1040 (4th Cir. 1976) (same); *Rosen* v. *Public Service Electric & Gas Co.,* 477 F.2d 90 (3d Cir. 1973) (same). Cf. *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 280 (1976) (white employee may allege race discrimination); *Faraca* v. *Clements,* 506 F.2d 956 (5th Cir.), cert. denied, 422 U.S. 1006 (1975) (white male may claim race discrimination when employment was denied because his wife was black).

Of course, a distinction based on the sex of a spouse discriminates among employees on the basis of sex because the spouse's sex defines the employee's sex: a plan that denies full coverage for female spouses only, because of their sex, necessarily denies employment benefits to male employees by virtue of *their* sex. Thus, a health insurance plan provided by an employer for his workers and their families which limits the spousal coverage available to male employees, because of their sex, is unlawful under Title VII. Such a plan forces a male employee, unlike his female conterpart, to finance himself some of the expenses resulting from his spouse's disabilities. The man is therefore provided a smaller compensation package than his female co-worker. This practice on its face violates Section 703(a)(l) of the Act, 42 U.S.C. 2000e-2(a)(l), which forbids an employer to discriminate against any individual with respect to his "compensation, terms, conditions or privileges of employment, because of such individual's * * * sex."

Petitioner's plan, of course, does not deny full coverage to employees' wives expressly because they are women. However, because it restricts coverage on the basis of a spouse's pregnancy, it is no more lawful than a plan that restricts coverage on the basis of a spouse's sex if, as the court of appeals held, the PDA establishes for all Title VII purposes that pregnancy-based distinctions are sex-based distinctions. The plain language of the PDA, as well as its legislative history, fully support that holding.

b. The text of the PDA is comprised of two clauses. The first states that Title VII's terms "because of sex" or "on the basis of sex" include "because of or on the basis of pregnancy"; the second states that "women affected by pregnancy * * * shall be treated the same for all employment-related purposes * * * as persons similar in their ability or

inability to work."[7] The Act on its face thus supplies a definition to be used in the analysis of any individual's claim, male or female. While the PDA makes clear that under Title VII women affected by pregnancy shall not be treated differently in benefit plans from other similarly situated persons, it nowhere limits its scope to pregnancies of employees as distinguished from those of spouses.[8]

c. Our construction of the Act is consistent with the policy and structure of Title VII itself. As the most comprehensive federal fair employment statute ever enacted, Title VII invests in all workers, women and men, the right to be free of discriminatory treatment in the work place. It prohibits the employment of women, or men, under terms and conditions less favorable than those accorded similarly-situated members of the opposite sex and, conversely, forbids preferential treatment of men, or women, on the basis of their sex.

To this broad, remedial law, the PDA adds a one-paragraph definition. Petitioner's contention that that definition applies only to claims of women workers does not

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[7]The second clause effectuates Congress's intent to overrule the underlying rationale of *Gilbert* "that employers may treat pregnancy and its incidents as *sui generis* without regard to it functional comparability to other conditions." S. Rep. No. 95-331, 95th Cong., lst Sess. 4 (1977).

[8]The argument that the comparsion to "ability or inability to work" in the second clause limits the PDA's scope to claims of female workers resembles the argument rejected by this Court in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). The Court held that 42 U.S.C. 1981 protects whites against racial discrimination because the statute's comparison to rights "enjoyed by white citizens" simply "emphasiz(ed) the racial character of the rights being protected" and did not restrict the statute's protection to non-whites. 427 U.S. at 287. Here, the comparison emphasizes the functional basis of the conditions to be covered.

comport with the fundamental, anti-discrimination principles upon which Title VII is founded. As this case demonstrates, men as well as women workers may be disadvantaged by employers' policies or programs that treat pregnancy less favorably than other medical conditions or disabilities. If the PDA extends protection from such pregnancy-based discrimination to women employees, while withholding the same protection from their male colleagues, Congress, in a simple definitional amendment to Title VII, has mandated special, preferential treatment contrary to the basic principles of the underlying law.

Moreover, petitioner's construction of the PDA is inconsistent with the structure of Title VII as amended. Under petitioner's view, the Act revises the meaning of Title VII's term "because of * * * sex," contained in Section 703(a), only when that section is invoked by women workers. Had Congress intended the definition of sex discrimination to subsume pregnancy discrimination *only* as to claims of women workers, it would scarcely have sought to achieve that purpose by amending Title VII's "Definitions" section, which defines the terms used "for the purposes of this title"—i.e., for use across-the-board to the analysis of all claims arising under it.

Thus, the language of the PDA and the purpose and structure of Title VII plainly indicate that all Title VII discrimination among employees resulting from different treatment of pregnancy-related conditions is prohibited by the amended Title VII, including discrimination against male employees resulting from denial of health insurance benefits for their wives' pregnancies.

d. The legislative history of the PDA confirms that this interpretation of the Act is correct. The committee reports explained that the PDA embodies the *Gilbert* dissenters' "commonsense view" that pregnancy distinctions are sex

distinctions and is intended to "make plain that, under Title VII * * * discrimination based on pregnancy, childbirth, and related medical conditions is discrimination based on sex." S. Rep. No. 95-331, *supra*, at 3-4; see also H. R. Rep. No. 95-948, 95th Cong., 2d Sess. 1-2 (1978).[9]

While the legislative materials show that Congress understandably focused on the effects of pregnancy-related discrimination on women workers,[10] two sponsors of the legislation— Senators Bayh and Cranston—discussed the specific question presented here: whether denial of spousal benefits for pregnancy unlawfully discriminates against male employees.[11] As the court of appeals noted (Pet.

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[9]Petitioner cites (Pet. 20), out of context, sentences in the Senate and House Reports to support its restrictive interpretation of the Act. Those sentences, indicating that the PDA "would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work", appear in paragraphs emphasizing that, as applied to women workers, the Act does not confer special benefits but "prohibits only discriminatory treatment." S. Rep. No. 95-331, *supra*, at 4, H.R. Rep. No. 95-948, *supra*, at 4. As we have noted, to apply the definition of Section 701(k) only to female employees would turn the PDA into precisely such a special protection statute solely for women workers, contrary to Congress's intent.

[10]Contrary to petitioner's claim (Pet. 19-20 & n. 19), such remarks showing Congress's special solicitude for women workers cannot, standing alone, support an interpretation of Section 701(k) that reads into the subsection a narrowing of the otherwise established principle that men are also protected by Title VII. Otherwise, the numerous statements in previous Title VII legislative history which voice concern over the protection of blacks, minorities, and women could also be read as establishing that whites and men are not protected by Title VII. This Court has squarely rejected such reasoning. See, e.g., *McDonald* v. *Santa Fe Trail Transportation Co.*, *supra*, 427 U.S. at 280.

[11]Petitioner's assertion that the PDA's principal Senate sponsor, Senator Williams, "assured Congress that his bill did not cover employees' dependents" (Pet. 24) misreads his colloquy with Senator Hatch, which related solely to receiving income maintenance or disability benefits during work absences occasioned by pregnancy. In that context, Senator Williams asserted that only women employees who are

App. 6a), both expressed the view that Title VII as amended by the PDA would require equal coverage of such medical expenses for wives of male employees where coverage is provided for husbands of female employees. 123 Cong. Rec. 29642 (1977) (remarks of Senator Bayh); *id.* at 29663 (remarks of Senator Cranston). Such floor statements by the sponsors of the legislation are entitled to great weight. *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 14; *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). See also *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Proposed Amendment to Title VII of the Civil Rights Act of 1964: Hearing on H. R. 5055 and H. R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 120-121 (1977) ("*House Hearings*") (testimony of Richard Minck, American Council of Life Insurance).[12]

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themselves pregnant are within the meaning of the phrase "women affected by pregnancy" (see Pet. 24-25 n. 25). Of course, income maintenance plans protect against wage loss and therefore necessarily apply only to employees. On the other hand, medical benefit or health insurance plans—which Senator Williams did not address—reimburse an employee for medical costs related to a disability and may cover employees only or, as here, spouses and other dependents. Congress was well aware of the difference between disability insurance and medical insurance. See, e.g., S. Rep. No. 95-331, *supra*, at 4-5; H. R. Rep. No. 95-948, *supra*, at 5-6.

[12]In presenting figures on estimated costs, the American Council of Life Insurance in both the Senate and the House based its estimate for the cost of medical benefits on estimates of births to all women in the population, because the bill was read as requiring employers to provide medical coverage for deliveries of dependents of male employees. See *Discrimination on the Basis of Pregnancy 1977: Proposed Amendment to Title VII of the Civil Rights Act of 1964: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 369, 402, 424, 431 (1977) ("*Senate Hearings*"); *House Hearings*, *supra*, at 94, 97-98, 101-05. The ACLI's cost figures

Moreover, the Commission informed Congress while the PDA was under consideration that Title VII as amended by the Act would prohibit the practice at issue here.[13] These views were contained in letters signed jointly by the Chairman of the EEOC, the Solicitor of Labor, and the Assistant Attorney General for the Civil Rights Division of the Department of Justice in response to an inquiry by Senator Javits, the ranking Republican member of the Senate Committee on Labor and Human Resources to which the Pregnancy Discrimination Bill, S. 995, was referred.[14] The

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were presented and discussed during the Senate debate on the bill, 123 Cong. Rec. 29650-29652 (1977) (remarks of Senator Hatch).

Similarly, the Department of Labor estimated the health insurance cost impact of the PDA based on expected births in the population, not merely births to female employees. *Senate Hearings, supra,* at 563-564, *House Hearings, supra,* at 181-182.

[13]The EEOC is the agency charged by Congress with the administration of the PDA. As such, its contemporaneous and consistent construction of the Act, in the guidelines issued within seven months after its passage (see *supra,* page 2), is entitled to great weight. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). Generally, to sustain an agency's interpretation of the statute for which it is responsible, a court "need not find that (the agency's) construction is the only reasonable one, or even that it is the result (the court) would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965) (citation omitted). Rather, that interpretation must be sustained absent "compelling indications that it is wrong." *Miller* v. *Youakim,* 440 U.S. 125, 144-145 n. 25 (1979); *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973).

Judicial deference is particularly appropriate where, as here, the EEOC informed Congress of the agency's construction of the proposed statute while it was still under legislative consideration. See *Zuber* v. *Allen,* 396 U.S. 168, 192-193 (1969); *Power Reactor Co.* v. *International Union of Electrical Workers,* 367 U.S. 396, 409 (1961); *Baltimore & O. C. T. R.R.* v. *United States,* 583 F.2d 678, 684 (3d Cir. 1978), cert. denied, 440 U.S. 968 (1979).

[14]Copies of the correspondence have been lodged with the Clerk of this Court. It was admitted into the record below by order of the court dated January 7, 1982.

Senate Committee issued its Report more than a week after the date of the Commission's last letter.[15] Surely, if Congress intended to limit the PDA to claims of women workers, it would have stated that the administrative interpretation exceeded the Act's reach. It did not do so. Instead, the Senate Report states with respect to the PDA's impact on dependent medical insurance coverage that, while the bill's basic purpose (not its sole purpose) is to protect women employees, the bill "clarifies the definition of sex discrimination" not just for the benefit of women employees but for all "Title VII purposes." Questions regarding dependent coverage and, in particular, spousal coverage were left open by the Committee for resolution by the EEOC and the courts, which were to apply this newly clarified definition of sex discrimination in accordance with "existing Title VII principles."[16]

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[15]Senator Javits' letter was dated June 6, 1977. The government responded in letters dated June 16 and June 28, 1977. The Report was issued on July 6, 1977. S. Rep. No. 95-331, *supra*, at 2; 123 Cong. Rec. 22188 (1977).

[16]The Report provides in relevant part (S. Rep. No. 95-331, *supra*, at 5-6):

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees; it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.
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> It was suggested before this committee that an effect of Title VII, once this bill was enacted, would be to require that if the maternity costs of women employees were paid under a medical plan, the similar costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect. This

Clearly, the "existing Title VII principles" to which the Report refers are the substantive precepts relevant to this issue, viz., that men as well as women are protected under the statute from treatment in the work place which is less favorable than that accorded the opposite sex; that dependent health coverage is a benefit which flows to the wage earner; and that a health insurance plan which limits the extent of dependent coverage because of the sex of the employee is unlawful. See *supra*, pages 6-7. It is these principles, together with Title VII's newly clarified definition of sex discrimination, which render petitioner's plan unlawful.[17] The court of appeals was correct in so holding and, should this Court grant the instant petition, its judgment should be affirmed.

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bill would not mandate that women dependents be compared with women employees, or that male employees with pregnant wives be compared with women employees themselves pregnant.

On the other hand, the question of whether an employer who does cover dependents, either with or without additional costs to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents.

[17]Petitioner's insistence (Pet. 24) that the "existing Title VII principles" to which the Report refers are embodied in *General Electric Co.* v. *Gilbert*, *supra*, is untenable. If petitioner were correct, the validity of plans of the sort the Report states the committee "certainly [did] not * * * desire to encourage" (S. Rep. No. 95-331, *supra*, at 6) would be virtually beyond dispute. *Gilbert* held that the exclusion of pregnancy from a benefits program is not sexually discriminatory absent a showing of disparate impact in the actuarial value of the benefit packages. Since such a showing would usually be very difficult to make, any

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

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challenge to the exclusion of spousal pregnancy coverage from an employer's insurance plan, as a practical matter, would be doomed to failure under *Gilbert*. The Senate Report viewed the lawfulness of such plans to be an open, litigable issue, however, and thus could not have intended *Gilbert* to be viable precedent "in the future," i.e., after passage of the PDA.

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